Supreme Court, U. S.
FILED
APR 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1197

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

v.

MASSACHUSETTS FINANCIAL SERVICES, INC.,
Respondent.

REPLY BRIEF

THEODORE H. FOCHT
General Counsel
SECURITIES INVESTOR PROTECTION CORPORATION
900 Seventeenth Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

Of Counsel:

WILFRED R. CARON
Associate General Counsel
WILLIAM H. SECKINGER
Senior Attorney
KEVIN H. BELL

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

15925-4-77

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1197

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

v.

MASSACHUSETTS FINANCIAL SERVICES, INC.,
Respondent.

REPLY BRIEF

The major deficiencies in MFS' brief are (1) its understandably limited perception of the importance of the issue and (ii) its simplistic argument which suffers as much from a misconception of the issue as it does from a significant lack of responsiveness to SIPC's arguments.

IMPORTANCE OF THE QUESTION

MFS' effort to suggest banality in this case overlooks the essence of why SIPC urges that the issue is "certworthy", *i.e.*, that "The Proper Construction Of

Section 3(a)(2) Is Important To The Administration Of SIPA" (Petition at 8). That is a sufficient independent basis for review under Rule 19(1)(b). The four components of that basis discussed by SIPC have not been undermined by MFS.

Uniformity

MFS does not question the importance of a uniform national application of SIPA, or the clear prospect of the contrary so long as this Court does not decide the issue. Instead, it merely notes an absence of conflict between two or more Circuits which is not the basis for review urged by SIPC. SIPC is charged with a responsibility to administer SIPA, including its funding. *SIPC v. Barbour*, 421 U.S. 412, 416 (1975). The issue presented is of vital importance to the federal program, and MFS inappropriately dismisses SIPC as a disappointed "private litigant". (MFS Brief at 7).

Financial Impact

MFS unfairly suggests that SIPC seeks review merely because of the dollar impact of three cases on SIPC's funds, and then attempts to dilute this Court's interest because SIPC, as it were, is hale and hearty. Regarding the former, SIPC has over 5,000[1] members whose payments through a wide-ranging statutory apparatus[2] make the actual dollar impact impossible to know at this time. Regarding the latter, while the current rate of new SIPA liquidations is clearly down

[1] 6 SIPC ANN. REP. 7 (1976).

[2] Under section 9(a) collections are effected nationwide by the various self-regulatory organizations and SIPC.

from the difficult years of 1971-73, the fact is there have been more new proceedings (five) in the six-month period ending March 31, 1977 than in any like period during the two previous years.[3] In the final analysis, however, this aspect of the importance of the issue does not and cannot depend upon the current contents of SIPC's purse or surmises as to its future expenditures. It is essential to the SIPA program that it be funded by the industry as Congress intended.

Customer Protection

Rather than answer the full breadth of this point (Petition at 10) MFS merely states that it ". . . sells only to broker-dealers and therefore does not hold cash or securities of the investing public." (MFS Brief at 8). First, such broker-dealers who purchase mutual funds from MFS on behalf of their customers could be entitled to protection from SIPC's funds if MFS is a SIPC member.[4] Second, SIPC has empirically determined that mutual fund sales and distributions create a drain on SIPC's funds.[5]

[3] 6 SIPC ANN. REP. 7, 18 and 26 (1976).

[4] Sections 6(d) and 6(f)(1)(D). Mutual fund shares are securities, of course.

[5] "To date, however, cash in lieu of missing mutual fund shares has been paid to 50 claimants in 8 different SIPC liquidations for a total of $190,655.

In addition, in three of those liquidations, mutual fund shares having an aggregate value of $69,483 were distributed to 14 customer claimants." Hearings on H.R. 8064 [Securities Investor Protection Act Amendments of 1975] Before Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 57-58 (1975) (statement of Mr. Owens, Chairman of SIPC).

Administrative Burdens.

This point (Petition at 9) has not been answered in a way which warrants comment.

THE MERITS

MFS's first tack is to erect a strawman by erroneously stating the issue. Contrary to MFS' statement,[6] the issue is not whether MFS is a broker or dealer because it renders investment advice to private clients. It has been stipulated that MFS is a registered broker-dealer, and that its securities business has not consisted exclusively of the exempting lines of business specified in section 3(a)(2) of SIPA.[7] The question is whether as a broker-dealer it is a SIPC member liable for assessments on its revenues which are assessable under section 4(i)(1).

MFS' discussion of the statutory language is preoccupied with the tidy but erroneous proposition that Congress used the terms broker and dealer in their technical 1934 Act sense. Thus, it evades much of SIPC's argument (Petition at 13-17), including the luminiferous reality that Congress' actual usage of the terms was clearly not technical. MFS fobs off that point in a footnote as "legislative overkill" (MFS

[6] "The question presented, therefore, is whether MFS is a 'broker or dealer,' not because of its 'exempt' broker-dealer business, but because of its unrelated investment advisory business which does not require registration under the 1934 Act or make MFS a 'broker' or 'dealer' in the traditional, ordinary or defined sense of those words." (MFS Brief at 10).

[7] "9. On December 24, 1972 and at all subsequent times relevant to the issues herein MFS has not been engaged exclusively in the lines of business specified in subparts (i) through (iv) of section 78ccc(a)(2) of the 1970 Act." Stipulation of Facts at 4.

Brief at n.7, pp. 10-11). That explanation clearly does not suffice. The quandary to which MFS' argument inevitably leads is exemplified by its statement that "Congress could not have stated more clearly its intention to exempt from SIPC membership those persons whose business as a traditional broker or dealer consisted of one or more of the enumerated lines of exempt business." (MFS Brief at 13).[8] As SIPC has observed (Petition at 14-15), neither insurance nor investment advice are technically the business of a broker or dealer, although both are specified in section 3(a)(2).

Perhaps the most unsupportable proposition to which MFS' sterile rationale leads is its contention that SIPA's membership [section 3(a)(2)] and assessment [section 4(i)(1)] provisions are not interrelated (MFS Brief at 14-15). SIPC's petition sufficiently establishes the contrary both as a matter of statutory language and legislative history (Petition at 15-26, especially 22-25). The most probative aspects of the legislative history, especially when read in light of the prior bills and testimony, are set forth at pages 20-25 of SIPC's Petition.

MFS' brief offers no effective response to SIPC's discussion of the relevant legislative history. Instead, it seeks to divert attention from the critical portions of that history by engaging in a protracted discussion of the relationship of risk to the SEC's exempting

[8] Similarly, in attempting to refute SIPC's description of the administrative problems generated by the decision below, MFS states that such decision requires only one inquiry, *i.e.*, ". . . whether a prospective member's traditional broker-dealer activities are limited to the lines of business enumerated in section 3(a)(2)." (MFS Brief at 8.)

powers which are not included in SIPA as enacted (MFS Brief at 17-23).

CONCLUSION

For reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THEODORE H. FOCHT
General Counsel
SECURITIES INVESTOR PROTECTION CORPORATION
900 Seventeenth Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

Of Counsel:

WILFRED R. CARON
Associate General Counsel
WILLIAM H. SECKINGER
Senior Attorney
KEVIN H. BELL